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APPEALS TO RACE PREJUDICE BY COUNSEL IN CRIMINAL CASES.

IMPROPRIETY OF APPEALS TO RACE PREJUDICE.

A criminal trial should be an intelligent, conscientious investigation under the law, with every favor for life, and every reasonable doubt as to the facts, in favor of the prisoner. The law of the land guarantees to every one accused of crime, regardless of race or color, whether of high or low degree, whether rich or poor, a fair and impartial trial. Race prejudice has no place in the court room, whether on the judge's bench, in the prosecutor's seat or in the jury box, and trials tainted by appeals thereto can not be said to be fair and impartial.[1] A public prosecutor is presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action, and by vituperation of the prisoner, and appeals to prejudice, seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and seeks no conviction through the aid of passion, sympathy, or resentment. Violators of the criminal laws should be vigorously prosecuted, but there is a vast difference between legitimate prosecution and appealing to race prejudice. Trials are to vindicate innocence or ascertain guilt, and are not to be vehicles for denunciation.

DUTY OF TRIAL JUDGE.

It is the duty of the court to see that the defendant is tried

1. "Every defendant at the bar of his country, white or black, must be accorded a fair trial according to the law of the land, and that law knows no color." Harris *v.* State (Miss.), 50 So. 626.

"Mulattoes, negroes, Malays, whites, millionaires, paupers, princes and kings, in the courts of Mississippi, are on precisely the same equal footing. All must be tried on facts, and not on abuse. Only impartial trials can pass the Red Sea of this court without drowning." Hampton *v.* State (Miss.), 40 So. 545, 546.

according to the law and the evidence, free from any appeal to prejudice or other improper motive, and this duty is emphasized when a colored man is placed upon trial before a jury of white men.[2] As said by the Supreme Court of Tennessee:

> "Our judges, court officials and jurors, are uniformly white men. The white race is dominant, and the negroes are, in a sense, our wards. When a negro is on trial, it is the duty of the court and counsel to be at special pains to see that race prejudice is entirely eliminated from all proceedings. Otherwise, justice cannot be attained. All races are equal before the law and have the same rights in our courts. No officer of the state can be allowed to forget this, and no language by such officer that tends to arouse race feeling, even though used in heat of argument, can be passed without rebuke. Such is the unbroken holding of the courts of the Southern States, where, by reason of the large number of negroes, the race question is likely to be most acute." [3]

So where, in the trial of a negro, appeals to race prejudice are made the trial judge should repress such improper discussion,[4] and instruct the jury that such remarks are improper, and not to be considered in their deliberations. The simple fact that the trial judge, occupying, as he does, a position of great power and influence, fails to interpose when a damaging statement is made in his presence, and before and to the twelve men who are trying the cause, is sub silentio an indorsement of the statement —at least, a seeming one.[5]

It is to be regretted that in some instances the trial judge, though appealed to, did not rebuke the prosecuting attorney, nor correct his argument, nor in any manner instruct the jury to disregard it.[6]

ARGUMENTS HELD PREJUDICIAL.

It is improper for counsel to make remarks reflecting upon

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2. Tannehill *v.* State, 159 Ala. 51, 48 So. 662.
3. Roland *v.* State (Tenn.), 194 S. W. 1097.
4. State *v.* Petit, 119 La. —, 44 So. 848.
5. Collins *v.* State (Miss.), 56 So. 527.
6. See Harris *v.* State (Miss.), 50 So. 626; Taylor *v.* State, 50 Tex. Cr. 560, 100 S. W. 393; Roland *v.* State (Tenn.), 194 S. W. 1097. See also, cases cited in footnotes 7 to 13 inclusive.

the veracity of the negro as a race,[7] and suggesting that the jury disbelieve a negro,[8] especially where he is the accused,[9] as against a white witness.

It is an appeal to race prejudice to refer to defendant in a prosecution for homicide as a "bad nigger" and to his alleged victim as a "white man's nigger." [10]

On the trial of a mulatto it is prejudicial error for the prosecuting attorney to make a bitter denunciation of mulattoes as a race.[11]

Where, upon the prosecution of a negress for arson in a locality in which there had been an armed conflict between the

7. Where a negro on trial sought to prove an alibi by a white man and three negroes, it was reversible error for the solicitor, in argument to the jury, to say: "Why, gentlemen, if you acquit this man on such an alibi as this, you can never expect to convict another negro of crime in this country. You know the negro race—how they stick up to each other when accused of crime, and that they will always get up an alibi, prove it by perjured testimony of their own color, and get their accused companion clear if they can." Tannehill *v.* State, 159 Atl. 51, 48 So. 662.

8. It was held that the following language: "You will believe a white man not on his oath before you will a negro who is sworn. You can swallow those niggers if you want to, but John Randolph Cooper will never swallow them," was an appeal to race prejudice. Battle *v.* United States, 209 U. S. 36, 39, 52 L. Ed. 670, 28 S. Ct. 422.

9. Hardaway *v.* State (Miss.), 54 So. 833.

10. Collins *v.* State (Miss.), 56 So. 527, 528, wherein the court said: "Those who are at all familiar with the favor, indeed, we may say affection, that the white man entertains for a 'white man's nigger,' can well and justly appreciate the effect that such an unwarrantable statement, made by an officer of the law, will have before the ordinary jury of the land."

11. In Hampton *v.* State (Miss.), 40 So. 545, the following language of the prosecuting attorney was held ground for reversal: "Mulattoes should be kicked out by the white race and spurned by the negroes; that the defendant was whiter than himself, the counsel of defendant, or the judge, or any of the jury, but that they were negroes, and that as long as one drop of the accursed blood was in their veins they have to bear it; that these negroes thought they were better than other negroes, but in fact they were worse than negroes; that they were negritoes, a race hated by the white race and despised by the negroes, accursed by every white man who loves his race, and despised by every negro who respects his race."

negroes and the white people many years before and in which the white people had only been saved from being massacred by the prompt action of the white men, the prosecuting attorney in his remarks to the jury spoke of accused as standing in the courtroom "in a place like this with its past history, and referring familiarly and contemptuously" to certain white persons named, and argued from that fact that a confession which she had made to the deputy sheriff who arrested her was not inspired by fear, it was held that such remarks were erroneous as they tended to excite race prejudice.[12]

In the appended note are set out additional illustrations of arguments held improper.[13]

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12. State *v.* Jones, 127 La. ——, 53 So. 959, wherein the court said: "The white men on the jury are called upon to bear in mind that this negro has dared to refer familiarly and contemptuously to white men; and these white jurymen are at the same time called upon to bear in mind that in 1873 nothing but the bravery and the quickness of action of the white men of the country around Colfax saved the white people of Colfax from massacre by the negroes. This last was what was meant by the words of 'in this courtroom, in a place like this, with its past history.' In 1873, the negroes rose in arms, and for a time, the white men, women, and children of Colfax stood in danger of massacre or worse at their hands. The whites of the neighboring country quickly got together. The negroes, to the number of over 500 took refuge in the courthouse, the whites fired the building, and those of the negroes that did not perish in the fire were shot down as they sought to escape from the flames. A trench was dug on the spot, and the unconsumed negro corpses were thrown in it. Two white men lost their lives—shot down by the negroes. Several others were dragged before the partisan federal tribunals of that time. The new courthouse, that in which the trial was being had, was built on the site of the old. It was this bloodiest, deadliest, and darkest chapter of the history of the two races in this state—this appalling holocaust to racial antagonism and hatred—the white men on the jury were called upon to bear in mind."

13. "The nigger man differs from the white man in this, among other things: that in case of this kind the white man kills the other man, while the nigger always kills the woman; and I want you men to give this nigger a plenty, so as to deter his class from this particular class of offense, to which they are addicted." Neal *v.* State, 50 Tex. Cr. 583, 99 S. W. 1012.

"If the negro was taken out of court there would not be much left." James *v.* State 170 Ala. 72, 54 So. 494.

ARGUMENTS HELD NOT PREJUDICIAL.

It is not every reference to the race of the defendant in a criminal trial that can be considered as an appeal to race prejudice or of sufficient gravity to justify reversal of a conviction. Thus, where defendant's counsel opened a discussion on the subject of lynching negroes for criminal assault on white women, and argued that his client was innocent because he had not been lynched, the reply of the prosecuting attorney that negro domination in times past had forced the white people to protect themselves, but that there was no longer any necessity for lynching, and every man, white or black, was entitled to a fair and impartial trial, was not an appeal to race prejudice.[14] And where in a prosecution of a negro for murder, the prosecuting attorney in his argument said: "Do not let it be said, gentlemen of the jury, that a jury of De Witt county citizens can

appearing that accused kept a negro club and had pleaded guilty to illegally selling liquor, the following remarks by the prosecuting attorney, "What causes white peope to rise in a mob in a community? Its a white jury backing up a burly negro in such offenses as packing a pistol. The experience you all have had is that such dives as this defendant was running causes the mobs," were objectionable and prejudicial, State *v.* Cook, 132 Mo. App. 167, 112 So. 710.

In a prosecution of a negro for shooting a white man with intent to kill, where the State's evidence was contradictory, the following language was held reversible error: "Gentlemen, I am putting it up now to 12 white men as to whether or not you will convict a negro for shooting a white man, and the jury last week convicted a white man for killing a negro; and I hope you will have the same sort of nerve, and convict this negro for shooting the white man. * * * Those white people over there do not often go wrong. He knew they would have found him guilty as charged. This time he is being tried by 12 men, and next time he will be tried by 100. * * * The people taking the law in their hands is necessary. The white people of this county will take the law in their own hands, and enforce the law to suit themselves, if you don't do it yourself. * * * This is our country. We bought it with our own blood, and we have a right to own and rule it, and we are going to rule it. * * * The time to turn a nigger loose for shooting a white man will never come in Amite county." Harris *v.* State (Miss.), 50 So. 626.

14. State *v.* Petit, 119 La. ——, 44 So. 848.

only hang a white man," but in response to an objection he stated that the remark was made because of questions asked by defendant's counsel in impaneling the jury as to their prejudice against negroes, such remarks were held not ground for reversal.[15]

Whether witnesses, in giving their testimony, will be influenced by the fact that they and the defendant in a criminal prosecution are members of the same race is a legitimate subject for discussion, and criticism of such witnesses by the prosecuting officer, predicated on the ground that they are likely to be so influenced does not involve an appeal to the jury to base its finding upon racial prejudice against the defendant. So it has been held that the following remarks by the prosecuting officer were not improper:

> "I am sure that this jury will not be influenced by the testimony of this congregation of negro witnesses that Ben Howard, a big Mason and church member, has been able to procure to prove the innocence of his son, Silas Howard." [16]

FAILURE OF COURT TO TAKE ACTION ON IMPROPER ARGUMENT.

Where the trial judge fails to take any action on a valid objection that an argument is an appeal to race prejudice the conviction will be set aside on appeal and a new trial awarded for the improper and prejudicial remarks.[17]

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15. Gibson *v.* State, 53 Tex. Crim. App. 349, 110 S. W. 41.

16. State *v.* Howard, 120 La. —, 45 So. 260, 261.

17. On the trial of a negro for homicide the prosecuting attorney made the following remarks to the jury: "I am well enough acquainted with this class of niggers to know that they have got it in for the race in their heart, and in their hearts call them all white sons of bitches." The trial court on objection failed to reprimand the attorney and instruct the jury to disregard the remarks. It was held that the defendant was entitled to a new trial. Taylor *v.* State. 50 Tex. Cr. 560, 100 S. W. 393.

In the prosecution of a negro for homicide, the prosecuting attorney remarked that: "The brother of deceased, a white man, was present at the trial, had come from the state of Alabama, was from a good family, and his people expected a verdict at the hands of the jury; that if the jury were not to convict this man it will be giving a license to every negro to kill any white man on any pretext, and

CURE OF ERROR BY ACTION OF COURT.

In some cases it has been held that the trial judge by taking proper and timely steps cured the error in an argument appealing to race prejudice. Thus where, in a prosecution for homicide, statements were made by the prosecuting attorney in his opening statement to the jury that there was no question of race prejudice to be considered by them, that white men had been hung for less atrocious crimes than that charged against defendant, to which the court promptly sustained objections, and instructed the jury not to consider the statements, but to make up their verdict on the evidence and the law of the case, and that the attorney had no right to refer to anything outside of the case or outside of the record, the error was cured, and defendant was not entitled to have the submission of the cause set aside therefor.[18] Where the prosecuting attorney, at the trial of a negro for murder, remarked, "If you allow negroes to shoot each other, how long will it be until they are shooting you white men?" and the judge said it was improper to appeal to race prejudice, or to refer to defendant's race, and that the attorney must not repeat the remark, but stay in the record, this sufficiently showed the court's disapproval of the remark.[19]

BEIRNE STEDMAN.

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without excuse." The trial court did not reprimand or caution the prosecuting attorney and did not charge the jury to disregard his statements, but stated that deceased's brother had testified why he was present without objection and that the prosecuting attorney desisted as soon as objection was made to such statements. It was held that the language was ground for reversal. State *v.* Lee, 130 Ala. —, 58 So. 155.

In a prosecution of a negro for an assault upon a white woman, the prosecuting attorney, after animadverting upon negro witnesses, said: "Even at that, I have more respect for these nigger witnesses than I have for these two white witnesses who have volunteered to come here and testify in favor of a nigger that he has a good reputation." The court failed to take any action when such expressions were objected to, and merely remarked that the witnesses were not volunteers if they had been subpoenaed. It was held that a new trial was proper. Roland *v.* State, 137 Tenn. 663, 194 S. W. 1097.

18. Smith *v.* State, 165 Ind. 180, 74 N. E. 983.

19. State *v.* Baker, 209 Mo. 444, 108 S. W. 6.